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No. 8[redacted]31

In the Supreme Court of the United States

AMERICAN UNITED MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

vs.

CITY OF AVON PARK, FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI, AND SUPPORTING BRIEF

GILES J. PATTERSON,
Counsel for Petitioner,
American United Mutual Life Insurance Company

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In the Supreme Court of the United States

AMERICAN UNITED MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

vs.

CITY OF AVON PARK, FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO: THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

May it please the Court, the Petitioner, American United Mutual Life Insurance Company, a corporation, respectfully shows this Court:

Statement of the Case

The above cause was filed in the District Court of the United States for the Southern District of Florida under

Section 83 of the National Bankruptcy Act as amended June 22, 1938 (11 U. S. C. A. 403). The petition of the City proposed a composition of its debts, and to the petition were attached the written consents of creditors of the City holding or owning bonds, (or judgments upon bonds), amounting to more than 66⅔ per cent of the total then outstanding. Among the creditors, were R. E. Crummer & Company, a Delaware corporation, and the Brown-Crummer Investment Company, a Kansas corporation.

R. E. Crummer & Company, a Delaware corporation, was organized in 1934 by the Brown-Crummer Investment Company, a Kansas corporation, exclusively for the purpose of representing clients of the latter company who had purchased bonds of Florida municipalities or political subdivisions that were in default in substantial amounts (R. 193); the officers and the control of the two corporations were substantially the same (R. 162, 178, 189, 192). Prior to July 17, 1937, these two corporations owned or represented a substantial portion of the bonds of the City of Avon Park which were then outstanding (R. 169). On that date R. E. Crummer & Company, the Delaware corporation, entered into a contract with the City of Avon Park, by which it was appointed Fiscal Agent of the City to effect a refunding of the City's debt by exchanging new refunding bonds for the City's outstanding bonds (R. 26). After the contract was executed, both of these corporations purchased other bonds and judgments against the City upon bonds, the bonds and judgments owned and purchased composing almost half of the claims held by creditors who consented to the petition. The Fiscal Agency contract required R. E. Crummer & Company, a Delaware corporation, to perform the following services: (R. 35)

> "Section 8. (A) That First Party shall defray all expenses incident to: (a) assembling the bonds herein proposed to be refunded; (b) printing the said Refunding Bonds; (c) the representation of Second Party in legal proceedings to validate said Refunding Bonds;

"(d) obtaining the approving opinion of nationally recognized bond counsel upon the procedure used for the issuance and validation of said Refunding Bonds, said counsel to be selected by First Party; (e) all other expenses in connection herewith which may be approved by First Party; (f) the cost of retaining special counsel to assist the City Attorney in determining the legal responsibility of the various properties which have at one time or another been within the supposed corporate area of Avon Park, Florida, for debt service taxed, said special counsel to be selected by First Party."

It appears from the record, that the proceedings in this case were initiated at the instance of the Fiscal Agent and were conducted by counsel employed by the Agent (R. 164). The Fiscal Agent was therefore a holder of a substantial portion of the outstanding bonds, and at the same time was in the position of acting as an agent of the City, managing, controlling and performing official functions of the City, which by law were committed to its officers.

The total of the City's debt as of July 1, 1937, (the date of proposed refunding) was $865,500.00 principal, and $358,251.76 interest (R. 208). The City proposed to issue new interest bearing refunding bonds in exchange for the entire amount of principal and accrued interest, less the amount by which the total accrued interest may be reduced by the sale to the City of accrued coupons from the bonds during the first six months at not exceeding 50% of par; the next six months at not exceeding 60% of par; the next six months at not exceeding 70% of par, and the next six months at not exceeding 75% of par. When the refunding bonds are issued they will not be worth more than 50% of their face value for at least six months thereafter, and the only way in which the City can pay the total of the debt represented by the refunding bonds, is through its probable ability to purchase a large portion of such refunding bonds at a discount from their face value (R. 177).

Under the plan, bondholders (other than the Refunding Agent) are required to pay to the Agent $20.00 per bond if they are willing to sell their accrued interest coupons and claims to the Refunding Agent at one-third of their value, and the City will in turn issue to the Agent refunding bonds for the par value of the claims thus purchased by it; or, holders may retain their coupons and interest claims and receive refunding bonds in lieu thereof, paying to the agent the sum of $40.00 per bond (R. 95-98).

Approximately one-half of the bonds from which consent has been obtained to the filing of the petition in this cause are owned or controlled by the Fiscal Agent (R. 104-106; 214-217). Unless these bonds are counted among those consenting, the City has not obtained the consent of more than two-thirds of its outstanding creditors as required by the statute. The agent will receive a profit from its arrangement with the City that will not inure to other holders. Hence, its consent to the filing of the petition is presumed to have been given by reason of that fact.

Application is hereby made to this Court for a Writ of Certiorari to review the decree of the Circuit Court of Appeals affirming the Interlocutory Decree of the District Court confirming the Plan of Composition on the following grounds:

I. The decision of the Circuit Court of Appeals, Fifth Circuit, rendered January 31, 1940, is contrary to the law of Florida, as laid down by the Supreme Court of Florida in its decision dated February 23, 1940, in the case of *Taylor v. Williams,* (not yet reported; a copy of the opinion therein is attached to this petition and marked Exhibit "A").

The Florida Supreme Court in that case held that a road district should be enjoined from issuing refunding

bonds under a contract with R. E. Crummer & Company, a Delaware corporation, because such contract attempted to appoint a foreign corporation, representing the holders of a substantial portion of the outstanding bonds of the City, as Fiscal Agent, to manage and control official functions involved in the issuance of refunding bonds.

R. E. Crummer & Company, a Delaware corporation, referred to in the *Taylor Case,* is the same corporation appointed Fiscal Agent of the City in the case at bar, and the services to be performed under the contracts in the two cases are identical (R. 35).

The decision in the Circuit Court of Appeals herein is in conflict with applicable Florida law in the following particulars:

(a) Sub-section (e), Section 403, 11 U. S. C. A., as a condition precedent to the confirmation of the plan, requires the Court to find that the Petitioner (the City) "is authorized by law to take all action necessary to be taken by it to carry out the plan." Under the law of Florida the issuance of the Refunding Bonds under the Plan of Composition here offered is illegal and can be enjoined by a taxpayer. The City in this case cannot legally "take all action necessary to carry out the plan" involved herein because it cannot deliver the refunding bonds, (the consideration for the composition), and under such circumstances the act requires the District Judge to dismiss the proceeding.

(b) The contract between the City and the foreign corporation Agent being illegal under the law of Florida, cannot furnish a legal predicate for a decree of a Federal court, confirming a Plan of Composition which is based upon an illegal contract, the contract being a part of the Plan (R. 23).

(c) The decision of the Circuit Court of Appeals is based solely on the authority of *Vallette v. City of Vero Beach,* 104 F. (2d) 59. That opinion held contrary to the law of Florida as announced by the Supreme Court of Florida in the *Taylor Case,* that there was no such conflict of interest as would prevent the foreign corporation from acting as Fiscal Agent under the contract, because it represented (or owned) a large part of bonds of the City. The law of Florida according to the Florida Court, does not contemplate or permit the appointment of a foreign corporation representing the holders of a substantial portion of the outstanding bonds as Fiscal Agent for a municipality, in managing or controlling official functions involved in the issuance of refunding bonds. After the decision of the Supreme Court of Florida, Petitioner applied to the Circuit Court of Appeals for a rehearing in this cause, and the petition was denied on the ground that it was not filed within the 21 days allowed by the rule of the Court, although the decision of the Florida Supreme Court was not rendered until after 21 days had expired.

II. The Circuit Court of Appeals has decided important questions of federal law which have not been, but should be settled by this court:

(a) By affirming the decree of this case on the authority of its previous decision in *Vallette v. City of Vero Beach,* supra, which has held that under sub-section 83 (b), being sub-section (b), paragraph 403, Title 11 U. S. C. A., the Plan of Composition in this case could, by contract between the City and one of the bondholders, impose the expense of refunding the City's debt upon other bondholders, thus relieving the City of all expense, at the expense of the holders other than the Agent.

(b) In like manner, it held that bonds of the City which were owned by the foreign corporation acting as Fiscal Agent of the City to effect a refunding of its in-

debtedness under a contract, could be counted in determining whether the City has secured the consent of the required two-thirds of its outstanding debts, although it appears that the Fiscal Agent will, through the decree of confirmation, profit by reason of its contract with the City at the expense of other bondholders, contrary to the fundamental requirement of bankruptcy law that all creditors shall receive equality of payment.

III. The decision of the Fifth Circuit Court of Appeals, by reason of its reliance upon its opinion in the earlier case of *Vallette v. City of Vero Beach*, supra, has decided a federal question in a way probably in conflict with the applicable decision of this Court, in *Case v. Los Angeles Lumber Company*, 84 L. Ed. 22, decided November 6, 1939, because in the *Vallette Case* the opinion of the Court indicated that its affirmance of the decree of the District Judge was predicated upon or was influenced by the fact that the "vast majority of the creditors of the City had consented" to the plan. This Court held in the cited case that such consent is not a test of whether the Plan is fair and equitable, and in this case nearly one-half of the bonds consenting were owned by the Fiscal Agent of the City.

WHEREFORE your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket "No. 9294, American United Mutual Life Insurance Company, et al., Creditors, Appellant, v. City of Avon Park, Debtor, Appellee", and that the said decree of the Circuit Court of Appeals may be reversed

by this Honorable Court, and that Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

AMERICAN UNITED MUTUAL LIFE INSURANCE COMPANY, a Corporation

By:_____

GILES J. PATTERSON,
Counsel for Petitioner.

EXHIBIT "A"

IN THE SUPREME COURT OF FLORIDA

January Term, A. D. 1940

DODGE TAYLOR,
Appellant,

vs.

B. A. WILLIAMS, as Tax Collector of Lake County, Florida, and GEORGE J. DYKES, as Clerk of the Circuit Court of Lake County, Florida, and F. E. OWEN, Chairman, GEORGE L. SINGLETARY, H. K. STOKES, H. H. HETHCOX and MANUEL SLOAN, as and constituting the Board of County Commissioners of Lake County, Florida, and R. E. CRUMMER & COMPANY, a Delaware Corporation, doing business in the State of Florida,
Appellees.

LAKE COUNTY

Opinion filed February 23, 1940.

An Appeal from the Circuit Court for Lake County, J. C. B. Koonce, Judge. Thos. B. Adams, Duncan, Hamlin & Duncan, for Appellant; J. W. Hunter, Harry P. Johnson, Robert J. Pleus, D. C. Hull, Hull, Landis & Whitehair, for Appellees.

WHITFIELD, J.

A resident citizen owner of described land located within each of several overlapping special road and bridge districts in Lake County, Florida, filed a bill in equity seeking to enjoin the sale of the land for the taxes levied and assessed for the year 1938, and to enjoin future taxes

against his land located in each of such overlapping districts to pay bonds issued by the several special road and bridge districts, respectively, for road construction, it being alleged that the bonds were illegally issued and are void. Other relief is also sought. The defendants filed no pleading. The Court denied an injunction and dismissed the bill of complaint. Plaintiff appealed.

This suit is not to validate bonds under the statute, but it is brought by a taxpayer alleging illegality of the tax imposed for payment of bonds alleged to be illegal and void. Illegality in the contract for refunding bond fees is also alleged.

Questions 1 and 8 formulated by appellant in effect present contentions that the constitution impliedly forbids statutes creating or authorizing road and bridge districts to be established, with taxing authority to levy district taxes and to issue district bonds for the construction or maintenance of public roads in the districts respectively; and that

> "the County of Lake had no power or authority under any general law or under any special law to execute or promise to pay such bonds and that the supposed original bonds attempted to be issued for these special road and bridge districts are not the bonds of the districts severally; that as to said districts they are void and without force or effect. The consequence is that the supposed refunding bonds involved in this case are, if anything, *original* contracts and void because never approved by any freeholder election. As a result of the illegality of both the original supposed bonds and the so-called refunding bonds all debt service levies made in 1938 for these special road and bridge districts are severally void."

Prior to the 1930 amendment to section 6, Article IX, constitution, regulating the issue of county, district and municipal bonds, various road and bridge districts in Lake County, Florida, were created or authorized by statute with statutory authority to issue district bonds for public road construction purposes and to levy taxes in the districts, respectively, to pay the bonds. Some special statutes like several of those in this case authorized district bond issues without an approving vote of the electorate prior to 1930.

It appears that the bonds were refunded in proceedings pursuant to a contract dated August 6, 1935, and additions thereto, and pursuant to resolutions adopted by the Board of County Commissioners of Lake County, Florida, April 6, 1936, approving, adopting and confirming such contract; and that on August 7, 1939, another agreement was approved and resolutions adopted for another refunding of "all outstanding principal of the funded indebtedness of the county and all special road and bridge districts therein".

The constitution provides for school districts, sections 10 and 17, Article XII; and does not expressly or impliedly forbid the establishment of drainage, road and bridge or other districts, but "incorporated districts" are expressly referred to in Section 10, Article IX. Amended section 6, Article IX of the State constitution was adopted in 1930, after many districts had been established throughout the State by or under statutory authority and after authority to issue bonds and to tax for district bonds and other purposes had been conferred upon and exercised by or for the districts by duly authorized officers for proper district purposes, all being done to secure local improvements or facilities. The 1930 amendment to the constitution recognizes the existence of established districts in the State, and expressly regulates future issues of district bonds and refunding bonds. This organic amendment in effect ap-

proved the statutory policy of the legislature authorizing local districts with bond and taxing authority for duly authorized district purposes, the constitution not forbidding statutes establishing or authorizing the establishment of districts with authority to issue bonds and to levy taxes to pay the bonds issued for public road construction and other district purposes. The construction and maintenance of public roads is for statutory determination; and it may be made in whole or in part a State or county or district purpose.

Districts are established by or under organic or statutory authority, not for local governmental purposes as are counties and municipalities, but for the purpose of constructing or securing and maintaining public roads or other public improvements or facilities for local benefits to accrue therefrom to the inhabitants of each district and its citizens and taxpayers. See Jinkins v. Intzminger, 102 Fla. 167, 135 So. 785; Hopkins v. Special R. & B. Dist., 73 Fla. 247, 74 So. 310; Martin v. Dade Muck Land Co., 95 Fla. 530, 116 So. 449; Lee, Compt. v. A.C.L. Ry., filed January 2, 1940. The taxes are not required to be measured by actual or immediate special benefits to lands or to the inhabitants of a district. See St. Louis & S. W. Ry v. Nattin, 277 U.S. 157, 48 Sup. Ct. 438, 72 L. Ed. 830. The Tennessee and other authorities as to the power of the legislature to create or authorize taxing districts, cited by counsel for appellant, do not control under the interpretation of the Florida constitution.

The constitution does not require all taxes to be levied by a statute, but "in pursuance of law"; and when a board of county commissioners is by statute authorized to "cause to be assessed and collected" a district tax for authorized district purposes, the county commissioners may by resolution require the tax assessor of the county to assess, and the tax collector of the county to collect, the authorized

district tax for district purposes. The statutes here involved are not shown to be invalid or to be illegally applied in issuing bonds and levying taxes to pay the bonds.

Even if in some instance the amount of bonds authorized to be issued by county commissioners for district purposes is not specifically and expressly limited by statute, yet there may be implied limitations; and if appropriate and not excessive original bonds are issued and validated and sold and the proceeds used as provided by law for authorized district purposes, the abstract validity of the bonds, when not illegal or void for violation of organic law, may not, when validated and used as authorized, be challenged in the absence of fraud in which the bondholder participated. No clearly excessive issue of bonds of a particular district was duly shown. See principles announced in Getzen v. Sumter County, 89 Fla. 45, 103 So. 104; Paul Bros. v. Long Branch, etc., Bridge Distr., 83 Fla. 706, 92 So. 687.

Neither authorizing resolutions adopted, nor public road refunding bonds issued, by or for a district without the required approving vote of the electorate of the particular road and bridge district can legally contain directly, indirectly or otherwise, any pledge or agreement or undertaking that will add to the security that was pledged in the original bonds for the payment of the bonds. Such road and bridge district refunding bonds must merely extend the time of payment of original bonds, with a continuation of the pledged security, though at a lower rate of interest if acceptable in exchanging refunding bonds for the original bonds. No doubtful or ambiguous provisions should be in a refunding bond. The original obligations alone may be included and extended. Such additional pledge or agreement or undertaking if included in the resolutions for issuing the bonds or in the bonds, violates amended section 6, Article IX of the constitution unless the required approving vote of the electorate is had. Statutes cannot

authorize such added pledge, agreement or undertaking in issuing road and bridge district refunding bonds under amended section 6, Article IX, constitution, unless an approving vote of the electorate is obtained for such added authority or security.

When proceedings are brought in the Circuit Court under the statute to validate authorized county, district or municipal bonds, validation should be denied not only where illegality appears, but also where there are serious errors, defects or deficiencies in the proceedings taken for issuing the bonds or in the form or substance of the bonds. Courts should validate bonds only when their legality is established and their regularity in every important particular is also shown, so as to avoid as far as possible doubts as to the legality and regularity of the bonds as issued, and to inspire confidence in the bonds. But when such bonds have been validated, only questions of legality with reference to organic requirements or prohibitions or absence of statutory power are considered by the courts in the absence of fraud.

In this case the statute authorized road and bridge district bonds to be issued by the Board of County Commissioners of the county in which the districts are located. The bonds were issued by the County Commissioners pursuant to resolutions adopted by them, and the bonds under the resolutions were signed by the Chairman and Clerk of the Board. In form the bonds, as shown by one quoted in the record, were issued in the name of "The county of Lake in the State of Florida for and on behalf" of "Special Road and Bridge District", etc. The tax obligation of the district and "the full faith, credit and resources of the said 'Special Road and Bridge District' are pledged for the payment of the bonds." The validating decree adjudged the bonds to "be valid and legal obligations against the said special road and bridge district." When the statute,

the resolutions of the Board of County Commissioners for issuing the bonds, and the bonds as issued are considered together, it is clearly apparent that the Board of County Commissioners attempted to follow the meaning and purpose or intent of the statute in issuing the bonds. While a validation of the bonds as worded might well have been denied and the cause remanded for a more appropriate form to be used, yet as the original bonds were duly authorized, validated and sold, and the proceeds used for the authorized purpose, it is now too late to assert the bonds to be invalid in their entirety because of the form of the bonds, which form is not forbidden or fatally defective, but merely inaptly worded. The original bonds are not shown to be invalid under the controlling law when the original bonds were issued prior to the adoption of amended section 6, Article IX of the constitution in November, 1930.

The refunding bonds provided for by the resolutions of April 6, 1936, were issued by "The Board of County Commissioners of the County of Lake, in the State of Florida, and on behalf of" the particular district, which is a more appropriate form than that used in the original bonds. In each case the obligor was and is the district for which the bonds were issued as authorized by the statutes.

After the original bonds were issued the State supplemented the district contract tax obligation by allocations of funds from the "second gas tax" levied by Chapter 15659, Acts of 1931; but such allocations are as to the bondholders a mere gratuity which may be terminated at any time. The district authorities have no authority to pledge such allocated funds, and any such provisions contained in a refunding bond are illegal and of no effect. See State v. County of Citrus, 116 Fla. 676, 157 So. 4, 97 A.L.R. 431. If severable, such illegal provisions may be regarded in law as eliminated from the face of the bonds,

the remainder of the bonds standing, unless the record of the issuing and validating proceedings show an intent to violate the organic provisions, which might invalidate the entire bond notwithstanding the validating decree. In this case the illegal provisions are severable and the record of issue or validation shows no positive intent to violate the mandatory provisions of amended section 6, Article IX or other provision of the constitution. The provision for "deferred interest" coupons is not authorized by law and should be eliminated. Outman v. Cone, filed December 23, 1939.

Referring to the form of road and bridge district refunding bond copied from the transcript of the record, the following is regarded as eliminated from the bonds:

"if this bond shall not have been called and retired as hereinafter provided, on or before six months prior to maturity, the full interest at the rate of six per cent. per annum, less the amount theretofore paid from the date hereof to such call date or such maturity date, shall also at that time be enforceable, collectible, and paid upon presentation and surrender of the special deferred interest coupon hereto attached. The right is hereby reserved to call and redeem all or any part of the issue of bonds of which this bond is one on any interest payment date, six months, or more, prior to maturity, according to the following terms and conditions: At Par, plus accrued interest at the rate then prevailing, from date hereof to July 1, 1945; at par plus accrued interest at the rate then prevailing and plus one-half of the deferred interest, from and after January 1, 1946, to and including July 1, 1955; at par, plus accrued interest at the rate then prevailing and plus three fourths of the deferred interest, from and after January 1, 1956, to and including July 1, 1960; and at par, plus accrued interest at the rate then prevailing and plus the full amount of the deferred interest, from and after

January 1, 1961, to and including January 1, 1963; and at maturity this bond shall be payable at par, plus accrued interest at the rate then prevailing and plus the full amount of the deferred interest. x x x x x "x x and the interest otherwise payable at maturity to make up the total of six per cent. (except as all or part of same is to be paid in certain cases in the event of said call for redemption) shall be deemed to be waived by the surrender of this bond. "x x x All rights and remedies which were available for the support and enforcement of the bond refunded by this bond shall be available for the support and enforcement of this bond."

The last quotation may include gas tax funds or other added security, and, being ambiguous, should be eliminated. With the above quoted provisions eliminated, the refunding bonds are not clearly shown to be illegal or void. The refunding bonds will then extend the original bond contract obligations.

Resolutions 10 and 11 contained in the contracts and resolutions for refunding the bonds are regarded as violative of section 6, Article IX, constitution, as amended, and are eliminated wherever they or either of them appears in the refunding bond contracts or resolutions. Such provisions being organically illegal, are not made valid by validating proceedings, and a tax payer may challenge such organic invalidity.

Section 5, Article VIII, Florida constitution as amended in 1900, provides for the division of each county into districts and for the election of one county commissioner from each of such districts, whose powers, duties and compensation shall be prescribed by law. Statutes authorizing the county commissioners to issue bonds and refunding bonds for the county and the road and bridge districts

therein, require official action in the issue of bonds and in all matters pertaining thereto which are functions or duties involving discretion and fiduciary attention to conserve the best interests of the county, the road and bridge districts therein, and the citizens, residents and taxpayers thereof.

Appellant's Question No. XI:

"Is the new 2 per cent refunding agreement dated August 7, 1939, complained of in the Taylor bill (Taylor Record, page 43), void, and should its performance have been enjoined?"

In the issuing of bonds to be paid by taxation, the official duties of the county commissioners include the administrative function of providing directly for the printing, approval and other legal or fiscal matters, not including mere technical or ministerial services which may be performed by employees. As shown by the resolutions adopted August 7, 1939, by the county commissioners; the contract of August 7, 1939, states that R. E. Crummer & Company, "first party," is "a Delaware Corporation," and the county commissioners, "second party". As stated in the agreement of August 6, 1935, R. E. Crummer & Company "represents the holders of a substantial portion of the outstanding bonds of Lake County." The law does not contemplate or permit the appointment of a foreign corporation representing "the holders of a substantial portion of the outstanding bonds" as fiscal agent for the county or districts in managing or controlling any of the official functions involved in the issuing of refunding bonds. The contract of August 7, 1939 provides:

"That first party (R. E. Crummer & Company) shall defray all expenses incident to: (a) assembling and exchanging the bonds herein proposed to be refunded; (b) printing the said refunding bonds; (c) the representation of Second party (the county commissioners) in legal proceedings to validate said refunding bonds; (d) obtaining the approving opinion of nationally recognized bond counsel upon the procedure used for the issuance and validation of said Refunding Bonds, said counsel to be selected by First party; (e) all other expenses in connection herewith which may be approved by First Party."

Nor does the law permit the payment of money from the sinking funds of the county or districts as fees for a refunding agent. Pierce v. Isaac, 135 Fla. 101, 184 So. 669. When such an agent may legally be employed for services in no wise official in their nature, proper compensation for such service may be provided for as the law authorizes.

The refunding resolutions and contracts are not in accord with law and the bill of complaint should not have been dismissed. This is a taxpayer's suit and not a bond validating proceeding.

DECREE REVERSED FOR PROPER PROCEEDINGS AND DECREE.

TERRELL, C. J. WHITFIELD, BROWN, BUFORD, CHAPMAN AND THOMAS, J. J. concur.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Reference to Opinion of Court Below

The opinion of the Circuit Court of Appeals, rendered on January 31, 1940, has not yet been reported. The entire opinion reads as follows:

"PER CURIAM:

> There being no substantial distinction between this case and that presented in Vallette vs. City of Vero Beach, 104 Fed. (2d) 59, the order appealed from is affirmed, upon the authority of that case."

II.

Statement of Grounds of Jurisdiction

The City of Avon Park seeks a composition of debts under the provisions of Sections 81, 82, 83 and 84 of Chapter IX, of the Bankruptcy Act, as amended June 22, 1938 (11 U.S.C.A. 403). From a decree of confirmation of the Plan of Composition and adverse to certain dissenting creditors, Petitioner, (as one of such dissenting creditors), has filed his Petition for Writ of Certiorari, as provided by Section 240 of the Judicial Code as amended (28 U.S.C.A. 347).

III.

Statement of the Case

Inasmuch as a full statement of the case, in so far as the facts are material to a consideration of this petition, has been given in the Petition for Certiorari under the heading "Statement of the Case", in the interest of brevity that statement is not repeated at this point.

IV.

Specification of Errors Intended to be Urged

The errors committed by the Circuit Court of Appeals in its decision, which we urge as a basis for consideration of this petition, are:

1. That the decision of the Fifth Circuit Court of Appeals is contrary to the law of Florida as announced by the Supreme Court of Florida, in the case of *Taylor v. Williams,* decided February 23, 1940, subsequent to the rendition of the decision in this case.

2. The Court erred in affirming the Interlocutory Decree of the District Court because it appears in the record that nearly one-half of the bonds that consented to the filing of this proceeding were owned by the Fiscal Agent of the City, which would receive a benefit or profit from the decree of confirmation at the expense of other bondholders, contrary to the fundamental principles of bankruptcy that all creditors of the same class shall receive equal treatment.

3. The Court erred in affirming this case upon the authority of *Vallette v. Vero Beach,* supra, because the Fifth Circuit Court of Appeals in its opinion in the *Vallette Case* indicated that its decision was influenced by the fact that a "vast majority of the creditors of the municipality" had consented.

ARGUMENT

Point I.

The decision of the Circuit Court of Appeals is contrary to the law of Florida, as announced by the Supreme Court of that state in Taylor v. Williams, supra.

The provisions of the contract between R. E. Crummer & Company, a Delaware corporation, and the City of Avon Park, (Section 8a) and those of the contract between the same foreign corporation and the Road and Bridge District involved in the *Taylor Case* are in substance identical. The Florida Court held that the duties to be performed by the corporation Agent under the contract in the *Taylor Case*, were duties which the law of Florida required to be performed by officials of the District. The exact language of the decision of the Florida Court is as follows:

> "The law does not contemplate or permit the appointment of a foreign corporation representing 'the holders of a substantial portion of the outstanding bonds' as Fiscal Agent for the county or district in managing or controlling any of the official functions involved in the issuing of refunding bonds."

(a) Sub-section (a) of Section 403, 11 U.S.C.A., provides that before affirming a Plan of Composition, the District Judge shall find that Petitioner is authorized by the law of the State of Florida to take all action necessary to carry out the Plan of Composition submitted in its Petition. As this condition is predicated upon the existence of lawful authority under the laws of the state, the decision of the Florida Supreme Court in the case of *Taylor v. Williams, supra*, that the City was not permitted to enter into a contract of Fiscal Agency with a foreign corporation that represented a large portion of its bonds (as is the case here) and that the issue of refunding bonds under such a contract should be enjoined in an action brought by a taxpayer, the City cannot legally issue the refunding bonds which are made the consideration for the proposed composition. Because of the invalidity of the refunding contract, the City cannot legally take the action necessary to carry out this plan, and the absence of this jurisdictional pre-requisite to a decree of confirmation is fatal to the proceedings because the federal statute under which the

proceedings were filed requires that under such circumstances the proceeding should be dismissed.

(b) The contract between the city and the Fiscal Agent being illegal under the law of Florida, as construed by the Supreme Court of that State, a federal court should not give legal effect to that contract in this proceeding against dissenting bondholders by affirming the plan of composition and enjoining rights of creditors upon their bonds and judgments, and compelling them to pay the agent fees provided for in its contract with the City where the illegal contract is an integral part of the Plan of Composition.

(c) The decision of the Fifth Circuit Court of Appeals in this case is predicated solely upon its opinion and decision in *Vallette v. City of Vero Beach,* supra. At the time the opinion in that case was rendered by the Circuit Court of Appeals the Florida Court had not passed on the validity of the provision of a refunding contract such as that here involved, and the Circuit Court of Appeals held that the fact that the foreign corporation was the owner or representative of creditors when it accepted employment as Fiscal Agent, did not create such a conflict of interest as to render the contract illegal. The opinion in this case necessarily reaffirmed that decision. The Florida Supreme Court, since the decision in *Vallette v. City of Vero Beach,* supra, and the decision in this case has held that under the law of Florida a municipal corporation is not permitted to appoint a foreign corporation representing the holders of a substantial portion of the outstanding bonds of the Petitioner, as Fiscal Agent, by a contract that requires the Agent to manage or control the official functions involved in the issuing of refunding bonds. The particular duties required of the Agent in the Florida case are identical with those required by the contract involved in the present case. Since the Florida

Court has held such a contract contrary to the public policy of the state, the federal court should likewise hold such contract illegal.

Whether invalidity of the contract involved in the case of *Taylor v. Williams,* supra, be considered as being due to the fact (a) that the Agent is a foreign corporation, or (b) that the Agent represents (or owns) a substantial portion of the bonds of the city, or (c) that the Agent is required to perform official functions which should under the law of Florida be performed by the public officials of the city, or whether it is due to the existence of two or all three of these facts, it is nevertheless true that in this case all three of such facts existed. The Agent is the same foreign corporation which was involved in the *Taylor Case.* The record shows that it was organized for the purpose of, and did represent bondholders to whom it, or its affiliate corporation, had sold Florida bonds, and that both corporations at the time of the contract owned bonds of the City, and after entering into its contract with the City, acquired more. The services to be performed by the Agent under both contracts are identical.

The refusal of the Circuit Court of Appeals to reconsider its decision after the decision of the Florida Court in *Taylor v. Williams,* supra, because of the fact that the time for filing a petition for rehearing had expired, renders it even more necessary that this Court take jurisdiction of this case; otherwise, the District Court would proceed to final decree on the assumption that its decree of confirmation was correctly made, although such decree is contrary to the law of Florida.

Point II.

The Decision of the Circuit Court of Appeals is Contrary to Applicable Decisions of this Court.

The primary requisite in all compositions in bank-

ruptcy proceedings has been equal treatment of all creditors of the same class. The decision of the Fifth Circuit Court of Appeals violates this principle in that:

(a) It sustains the power of the District Court to give effect to the provisions of a contract between the City and one of its creditors, to assess the expense of the refunding, including the cost of the bankruptcy proceeding, against other creditors, so long as the proposal to do so is included within the Plan of Composition.

(b) It reaffirms that right in the present case although in order to comply with the provisions of subsection (d), paragraph 403, 11 U. S. C. A., the Plan must have been accepted in writing by at least two-thirds of the aggregate amount of claims, and it also affirmatively appears that in order to hold that the consent of 66⅔% has been given, it is necessary to count the bonds owned by the Fiscal Agent of the City, which would receive a substantial benefit from the confirmation of the Plan.

Both of these holdings are contrary to the principles of bankruptcy as applied to composition, because they result in a discrimination in favor of the Agent and against other bondholders. The Court must necessarily presume that the consent of the Agent on behalf of the bonds it represents or owns, to the filing of the petition, was given in order to enable it to enforce provisions of its contract with the City and collect its fees for the refunding from other holders, as well as to benefit by its speculation in coupons. This Court should also consider the fact that the City, by its contract with one of its holders, imposed all of the expense of a proceeding brought for its benefit upon bondholders.

In its opinion in the *Vallette Case*, the Circuit Court of Appeals admitted that it was troubled by the element

of speculation on the Agent's part in the old coupons which might lead "to discontents, or even scandals." Although it expressly said it did not approve the plan *in principle*, it affirmed the decree of the District Judge. Any contract arrangement that might have such a result is contrary to public policy and should not be presumed to be a compliance with the provision of an act of Congress.

III.

The Circuit Court of Appeals has Decided a Federal Question in a Way Probably in Conflict with the Decision of this Court in Case v. Los Angeles Lumber Company.

By affirming the decision of the District Court in this case upon the authority of its own opinion in the case of *Vallette v. Vero Beach*, 104 F. (2d) 59, the Circuit Court of Appeals thereby impliedly reaffirmed its holding in the latter case, that the consent of the vast majority of creditors to the composition strongly supported the action of the District Judge. This Court in *Case v. Los Angeles Lumber Company*, decided November 6, 1939, held that the consent of a vast majority of creditors furnished no proof that the plan was fair and equitable. In this case where it affirmatively appears that nearly one-half of the bonds consenting to the plan are owned by the Fiscal Agent, the lower court should have held that this fact at least created a presumption of unfairness that should have been overcome by affirmative evidence to the contrary.

The procedure for composition under Paragraph 403, Title 11, U. S. C. A., necessarily requires an agreement between the holders of a majority of the bonds of the

taxing district and the district itself. It could never have been intended to authorize the taxing district and one group of bondholders to use that agreement in a manner and for the purposes shown in this case.

Respectfully submitted,

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